In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1383

WILLIAM WARD EHLERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Northern District of California, petitioner was convicted of having wilfully disobeyed the order of his local Selective Service board to submit to induction, in violation of 50 U.S.C. App. 462. He was sentenced to two years' imprisonment. The court of appeals reversed, one judge dissenting (Pet. App. xviii–xx). Rehearing *en banc* was thereafter ordered, however, and the court of appeals affirmed the conviction by an eight-to-five vote (Pet. App. i–xvii).

The issue which prompted the court of appeals to grant rehearing *en banc* and on which petitioner seeks review is whether the alleged maturation of con-

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scientious objector beliefs is, within the language of 32 C.F.R. 1625.2, a circumstance "over which the registrant had no control," so that the local board is required to reopen a registrant's classification when, it is asserted, such beliefs crystallized and a C.O. claim is made for the first time *after* a notice to report for induction has been mailed. As petitioner points out (Pet. 7), the courts of appeals are, and have been for some time, sharply divided on this question, with the Ninth Circuit in the instant case aligning itself with the majority of circuits, which have held that such claims fall outside the scope of the regulation (see Pet. App. ii–iii).[1]

While we agree with petitioner that the issue is a recurring one and that the evenhanded administration of the Selective Service laws justifies its resolution by this Court, we entertain doubts as to whether this case is the proper vehicle for resolution of the issue. As Judge Ely pointed out in his concurring opinion (Pet. App. ix–xii), it is extremely doubtful that petitioner's representations to the local board were sufficient to establish that his beliefs had in fact crystallized *after* receipt of the induction notice. We note, moreover, that the identical issue raised by the petition here is included, as one of the questions presented, in the government's pending petition for certiorari in *United States* v. *Holmes*, No. 1311, this Term. *Holmes* involves a ruling of the Second Circuit that a conscientious objector

[1] Despite the conflict in the circuits, this Court has on a number of occasions declined the opportunity to resolve it. See *Hoapili* v. *United States*, 395 F. 2d 656 (C.A. 9), certiorari denied, 395 U.S. 930, and the cases cited at Pet. 7 and Pet. App. ii–iii, in which cases presenting this issue review was denied by this Court.

claim, raised for the first time orally and at the induction station itself, must nonetheless, under the pertinent regulation (32 C.F.R. 1625.2), be considered by the local board.[2]

If our petition in *Holmes* is granted, the Court's decision on the merits is likely to cast light upon or settle the question which is sought to be presented by petitioner and which was reached and resolved by most of the judges below in this case. Accordingly, the Court may (notwithstanding our position that the issue is not appropriately posed in this case) wish to defer disposition of the instant petition until it acts in the *Holmes* case. Should the Court deny our petition in *Holmes*, however, it is our view that, for the reasons stated above, certiorari should be denied in this case.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1970.

[2] *Holmes* thus involves additional questions as to whether, even if the maturation of conscientious objector beliefs after the mailing of the notice of induction is within 32 C.F.R. 1625.2, such a claim must be considered when presented orally (rather than in written form, as the regulations prescribe), and when made to personnel at the induction station instead of to the appropriate local board.

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